R. W. OFFERLE

IBLA 83-774 Decided November 9, 1983

An appeal from a decision of the Albuquerque, New Mexico, District Office, Bureau of Land Management, providing notice of rental due for right-of-way grant NM 53582.

Reversed and remanded.

1. Act of July 26, 1866--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Federal Land Policy and Management Act of 1976

   Prior to the repeal of the right-of-way provisions of the Act of July 26, 1866, 14 Stat. 253, as amended, 43 U.S.C. § 661 (1970), by sec. 706(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2793, one who appropriated water pursuant to the 1866 Act could acquire a right-of-way for reservoirs, dams, pipelines, ditches, and canals crossing public land merely by constructing such improvements, no application to the Federal Government being necessary.

2. Act of July 26, 1866--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Federal Land Policy and Management Act of 1976

   Repeal of the right-of-way provisions of the Act of July 26, 1866, 14 Stat. 253, as amended 43 U.S.C. § 661 (1976), by sec. 706(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2793, did not affect rights-of-way previously acquired under the 1866 Act.

Appearances: R. W. Offerle, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

R. W. Offerle appeals from a decision of the Albuquerque, New Mexico, District Office, Bureau of Land Management (BLM), dated June 15, 1983, notifying him of rental charges due for right-of-way grant NM 53582 and that, if not received within 30 days after receipt of the notice, action would be taken to terminate the right-of-way.

In the early 1940's, Alva Stark completed an irrigation ditch across public land in the W 1/2 SE 1/4 and S 1/2 SW 1/4 sec. 26, T. 29 N., R. 12 W., New Mexico principal meridian, San Juan County, New Mexico, to carry water appropriated by him in 1930. Stark maintained this ditch until 1968, when he transferred it and the land irrigated to Offerle, who has used the ditch since then in the same manner as Stark did. The public land over which the ditch crosses is managed by BLM with "emphasis on wildlife habitat and wildlife use." In 1981, Offerle, without authorization, bladed a roadway on the public land adjacent to the ditch. Alarmed by his action, BLM notified him that a right-of-way was not recorded in conjunction with the water rights appropriated by Stark in 1930 and that:

> A right-of-way to construct the Stark Ditch should have been obtained from the Secretary under the Act of March 3, 1891. * * * Since the irrigation ditch does not appear in our official records, it is not considered an authorized improvement and therefore would not be afforded protection should the land change ownership or be needed for another purpose. * * * [W]e feel that it would be mutually advantageous for you to file a formal right-of-way application for the ditches location.

Pursuant to BLM's instruction, Offerle filed an application and right-of-way grant NM 53582 was issued effective December 1, 1982, under the authority of Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1976). The right-of-way granted is 4,100 feet long, and 50 feet wide, and is for a duration of 15 years.

In a March 28, 1983, notice, BLM advised Offerle that the annual rental charges for the grant had been computed and a fee of $492 was due within 30 days from receipt of the notice. 1/ Offerle protested the rental charges as excessive in a letter received by BLM on April 29, 1983. In response, BLM informed him in a letter dated May 20, 1983, of a proposed alternative which involves decreasing the right-of-way width to 20 feet and reducing the rental charge accordingly to $190 per annum. This proposal had not been addressed by Offerle in the record when he received another notice of rental fee due for $492, dated June 15, 1983. This notice provided a right to appeal to this Board, which he has done.

In his statement to this Board, Offerle argues that $492 is an unreasonable amount to charge for a 40-year old ditch previously worked without charge. An ancillary thrust of his statement of reasons relates to benefits

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1/ "Said fee shall be based upon the fair market value of the rights authorized in the right-of-way grant or temporary use permit, as determined by appraisal by the authorized officer." 43 CFR 2803.1-2(a).

BLM's rental assessment is predicated upon the right-of-way as a part of the 200-acre parcel which it crosses. The appraisal conducted by BLM appraised the fair market value of the 200-acre parcel at $1,000 per acre through comparison with nearby, similar lands. Right-of-way grant NM 53582 encompasses approximately 4.8 acres, which has a pro rata fair market value of $4,800. Based on a desired return rate of 10-1/4 percent, the annual rental fee was determined by BLM to be $492.

to the Government and the public derived from existence of the ditch and his activities thereon. 2/

Offerle filed his application following BLM's instruction and it was received for consideration under the authority of the Act of March 3, 1891, 43 U.S.C. § 946 (1970). However, that Act was repealed by section 706(a) of FLPMA and the grant was later issued under the authority of the latter Act. See Nelbro Packing Co., 63 IBLA 176, 184 (1982); New England Fish Co., 42 IBLA 200, 202 (1979) (appeal pending).

The 1891 Act is but one of several statutes prior to FLPMA which provided for issuance of rights-of-way for irrigation ditches. Both the 1891 Act and the Act of February 15, 1901, 43 U.S.C. § 959 (1970), required prior approval from the Department before a right to use public land could exist. Since both Acts were repealed by FLPMA, they have no applicability to issuance of a right-of-way grant where approval of the right-of-way was sought subsequent to the enactment of FLPMA.

[1] BLM, however, apparently did not consider another pre-FLPMA act under which a right-of-way might have been obtained for irrigation purposes; the Act of July 26, 1866, as amended, 43 U.S.C. § 661 (1970). The water rights and the accompanying right-of-way available under the 1866 Act were explained in Hunter v. United States, 388 F.2d 148 (9th Cir. 1967), as follows:

> "For many years prior to the passage of the Act of July 26, 1866, c. 262, § 9, 14 Stat. 251, 253 (30 USCA § 51 and note 43 USCA § 661, par. 1 and note) the right to the use of waters for mining and other beneficial purposes in California and the arid region generally was fixed and regulated by local rules and customs. The first appropriator of water for a beneficial use was uniformly recognized as having the better right to the extent of his actual use. * * * The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection * * *. The rule was evidenced not alone by legislation and judicial decision, but by local and customary law and usage as well. Basey v. Gallagher, 20 Wall. 670, 683-684, 87 U.S. 670, 683-684, 22 L.Ed. 452 (1974); Atchison v. Peterson, 20 Wall. 507, 512-513, 87 U.S. 507, 512-513, 22 L.Ed. 414 (1874).
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> This general policy was approved by the silent acquiescence of the federal government, until it received formal confirmation of Congress by the Act of 1866, supra. Atchison v. Peterson, supra. Section 9 of that act provides that:

2/ 43 U.S.C. § 1764(g) (1976) provides: "Rights of way may be granted, issued, or renewed * * * to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned * * *." See also 43 CFR 2803.1-2(c)(3).

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed: * * *

* * * And in order to make it clear that the grantees of the United States would take their lands charged with existing servitude, the Act of July 9, 1870, c. 235, § 17, 16 Stat. 217, 218 (30 USCA § 52 and note, 43 USCA § 661, par. 2 and note) amending the Act of 1866 provided that:

> * * * All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory.

The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain." California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 154-155, 55 S.Ct. 725, 727, 79 L.Ed. 1356 (1935). [Emphasis added.]

Id. at 151-52. Section 706(a) of FLPMA amended 43 U.S.C. § 661 (1970) by deleting those clauses underlined. See 43 U.S.C. § 661 (1976). Those repealed portions of section 661 previously granted rights-of-way for ditches and canals for mining, agriculture, and other purposes where water rights had vested and were duly recognized, and provided that all patents and entries thereafter "be subject to" the rights in ditches and reservoirs used in connection with vested water rights. The right to appropriate water under the 1866 Act was preserved.

The viability of the 1866 Act, subsequent to the 1891 and 1901 Acts aforementioned, was previously addressed by this Board in John V. Hyrup, 15 IBLA 412 (1974), where an appellant sought a right-of-way pursuant to section 661, having constructed a water pipeline in 1972 across public land. The Board, holding that the appellant was not entitled to a right-of-way under the 1866 Act, stated:

> Even if we assume, arguendo, that Hyrup did have a vested right under Colorado law to appropriate the waters from the

> spring, which right was protected by 43 U.S.C. § 661, this would not entitle him to a right-of-way over federal land. Utah Power and Light Company v. United States, 243 U.S. 389, 410, 411 (1916). Water rights are distinct from rights-of-way over public land and are so treated by statute. The Acting Solicitor's Opinion on Right-Of-Way for Ditches and Canals, issued July 16, 1942 (58 I.D. 29), discussed at length the issue of whether the right-of-way clause in the Act was superseded by subsequent legislation. It was his opinion that the right-of-way clause in § 2339 of the Revised Statutes, now 43 U.S.C. § 661, has been entirely superseded by § 1 of the Act of May 11, 1898, 30 Stat. 404, 43 U.S.C. § 956 (1970). This Act was superseded by the Act of February 15, 1901, 31 Stat. 790, 43 U.S.C. § 959 (1970). Therefore, appellant is not entitled to a right-of-way under 43 U.S.C. § 661 (1970).

Id. at 420.

The Board's decision was reversed by the United States District Court, District of Colorado, Hyrup v. Kleppe, 406 F. Supp. 214 (D. Colo. 1976), and the district court was affirmed by the Tenth Circuit Court of Appeals in an unpublished opinion, Hyrup v. Kleppe, Nos. 76-1452 and 76-1767 (Nov. 7, 1977). The Court of Appeals stated at pages 5, 9:

> The trial court held that the 1886 Act, 43 U.S.C. § 661, had not been repealed by implication contrary to the position taken by the agency. The BLM determinations on plaintiff's application had expressed the view that 43 U.S.C. § 959 (the 1901 Act) was the only operative provision relating to such a right of way, and apparently denied the application for that reason. The trial court read both sections 661 and 959 together, finding that there was room for the application of both, thus holding that the right of way was acquired under the older Act, but under section 959 the Secretary could impose reasonable conditions on it.
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> We hold that the Act of 1866 was not superseded or repealed, as far as the problem before us is concerned, by the Act of 1901. Thus, the trial court's analysis of this matter was correct. [Emphasis in original.]

Therefore, the court ruled that the 1866 Act remained viable despite the subsequent legislation relating to irrigation rights-of-way across public land, and that one who possessed a vested water right under 43 U.S.C. § 661 (1970) could acquire a corresponding right-of-way across public land under the same authority.

[2] An issue created by the enactment of FLPMA is the impact on section 661 rights-of-way of section 706(a), which repealed the rights-of-way provisions of the 1866 Act.

An individual who has established an appropriation of water on public land by him and his predecessors of right to use water is entitled to a right-of-way over lands to divert the water by one of the methods contemplated

by statute respecting protection of vested water rights. Hunter v. United States, supra. This Board has opined by way of dictum, that the 1866 Act's right-of-way provision is self-executing and requires no Departmental approval, provided, of course, that the right to the use of the water has vested. John H. Hyrup, supra at 412. Therefore, prior to FLPMA one availed himself of section 661 by merely constructing a ditch or canal, no application to any official of the United States beforehand being necessary for a right-of-way over public land. Clausen v. Salt River Valley Water Users' Assn., 59 Ariz. 71, 123 P.2d 172 (1942). See Bear Lake Irrigation Co. v. Garland, 164 U.S. 1 (1896). Section 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1976), provides in pertinent part: "Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted." Clearly, since no consent or permission is required under section 661 to initiate a right-of-way, one who has complied with section 661 on or before October 21, 1976, the effective date of FLPMA, has a valid "right-of-way heretofore permitted" within the meaning of section 1769(a). Bumble Bee Seafoods, Inc., 65 IBLA 391, 398 (1982). 3/

BLM limited right-of-way grant NM 53582 to a 15-year duration. Referring to the statutory provisions of section 661, we are mindful that the 1866 Act specifies the appurtenances to the water right addressed therein shall consist of the "right of way for the construction of ditches and canals." The language does not limit a right-of-way created thereunder to a specific duration, but the implication is that such dependent right-of-way, necessary to the use of the appropriated water, should endure for as long as the vested right to the water exists.

A right-of-way under section 661, however, is not totally immune from administrative control. The district court in Hyrup v. Kleppe, supra, held that the right-of-way established under the Act was modified by the 1901 Act, 43 U.S.C. § 959 (1970), so as to permit the Secretary to condition section 661 rights-of-way by reasonable regulations to protect the public interest. The court defined the public interest to "include such reasonable conditions and limitations as may be necessary for the protection of the environment. Id. at 217. The circuit court found no error in that conclusion.

In 1940, rental fees were not assessed against 1866 Act rights-of-way under Department regulations. See 43 CFR Part 244 (Cum. Supp. 1938-43). Particularly, the regulations allowed for no fee assessment for various right-of-way activities, including irrigation. 43 CFR 244.13(b) (Cum. Supp. 1938-43). 4/ Thus, no fee was required for use of public lands for irrigation ditches when the right-of-way was established by Offerle's predecessor in interest.

3/ This Board, by order dated Dec. 13, 1982, vacated the decision in Bumble Bee Seafoods, Inc., supra. Subsequently, however, by order dated Mar. 11, 1982, the Board reinstated that decision to the extent that it held that Bumble Bee had a vested right to a right-of-way under 43 U.S.C. § 661 (1970).

4/ Part 244.13(b) (Cum. Supp. 1938-43) reads: "Except as to Indian lands, no charge will be required for the use and occupancy of public or reservation lands under a permit or easement authorizing such use and occupancy exclusively for municipal purposes, for irrigation, or non-profit cooperative projects." (Emphasis added.)

Present regulations provide for periodic readjustment of right-of-way grants, maintaining rental fees at fair market rental value. 43 CFR 2803.1-2. The opportunity to readjust pre-FLPMA rights-of-way under regulations promulgated pursuant to FLPMA is derived from the limited duration of most right-of-way grants. When a grant expires, it becomes subject to renewal under present regulations. As noted, section 661 rights-of-way are not for a limited duration, but are perpetual, or until the right-of-way is no longer necessary for the purpose under which the water right was established. Without an expiration, or cutoff date, there is no opportunity for the Department to conform a section 661 right-of-way to FLPMA standards. 5/

As the facts are recorded, Stark built the ditch long before section 661 was revised by FLPMA and it has been used since completion in a manner consistent with the 1866 Act. No challenge is made regarding Stark's appropriation, which appropriation appears as an accepted fact in the record. Since the District Office failed to consider the applicability and attendant implications of section 661 when it instructed Offerle on how to file his right-of-way application and when it processed that application, the decision to assess an annual rental fee for the right-of-way grant will be reversed and the case remanded with instructions to recognize Offerle's right-of-way as established under the Act of July 26, 1866, as amended, 43 U.S.C. § 661 (1970).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded for action consistent with this decision.

Edward W. Stuebing
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

5/ Section 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1976), also provides: "However, with the consent of the holder thereof, the Secretary concerned may cancel such a right-of-way or right-of-use and in its stead issue a right-of-way pursuant to the provisions of this subchapter." Therefore, with the right-of-way holder's consent, the FLPMA standards may be applied to a pre-FLPMA right-of-way prior to its expiration or termination.